



**Mutuku v Republic (Criminal Appeal E039 of 2023)  
[2024] KEHC 17226 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 17226 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E039 OF 2023  
TM MATHEKA, J  
APRIL 26, 2024**

**BETWEEN**

**CATHERINE NZILANI MUTUKU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. P.N Gesora (C.M) in the Chief Magistrate's Court at Makueni Criminal Case No.E359 of 2022, delivered on 27th July 2023)*

**JUDGMENT**

1. Catherine Nzilani Mutuku was charged with threatening to kill contrary to section 223(1) of the [Penal Code](#). It was alleged that on 11/11/2022 at kwa Kathoka Village at around 11:00am in Makueni Sub-County Makueni County without lawful excuse uttered words “ngakuaa na uyuvetanga vaa” words meaning “ I will kill you and live here forever” while holding a club at her piece of land against one Esther Ndunge Munguti.
2. She was arrested on 17/11/2022, and took plea on 18/11/2022. She pleaded not guilty.
3. After a full trial, the accused was found guilty, convicted and sentenced to serve 3 years’ imprisonment on 27/7/2023
4. Aggrieved the accused filed this appeal on the following grounds:
  1. That the appellant pleaded not guilty to the charges.
  2. That the trial magistrate erred in both law and facts by relying on inadmissible hearsay testimony by the witnesses who actually testified to the prejudice of the appellant. In that, the trial court relied on hearsay evidence from prosecution witnesses which was as a result of grudge; and failed to note that there was a likelihood the charges against the appellant were born out of malice and ill-will.



3. That the learned trial magistrate erred in law and facts in shifting the burden of proof to the appellant and further meting out a harsh sentence without considering the compelling defence and mitigation given by the appellant.
4. That the learned trial magistrate failed to test the evidence of the prosecution which was riddled with discrepancies and inconsistencies that lacked probative value to warrant a conviction.
5. That the trial magistrate erred in law and fact as he deliberately overlooked that the witnesses gave false evidence despite the fact that they were under oath to tell the truth and also overlooked the cross-examination of the defence counsel, which was biased and in favour of the prosecution.
6. That the trial magistrate erred in law and facts by failing to find that the prosecution ought to prove its case beyond any reasonable doubt as required by law and not beyond any shadow of doubt. The evidence adduced before court can be termed as single evidence since the witnesses were family members.
7. That the learned trial magistrate failed to test the evidence of the prosecution witnesses and caution the circumspection thereby convicting on flimsy, inconsistency and evidence that was not water tight enough to justify a conviction.
8. That the appellant's conviction based on the evidence was manifestly unsafe; in that the investigating officer failed to prove his case beyond reasonable doubt as required by law, for shoddy investigations done which could not warrant a conviction. As per the evidence on record from the witnesses, the investigating officer failed to produce the 'club' before court which could link the appellant with the commission of the alleged offence. He acted in mala-fides while handling the matter.  
  
Crucial witnesses like the area chief or headman were not called to testify if the appellant had been a problem in the family for more than a year and no incident was ever reported to them.
9. That the trial magistrate erred in law and facts in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubtful without the benefit of properly scrutinizing and evaluating their testimony therefore arriving at an erroneous decision.
10. That the appellant is appealing to this honourable court to grant him a bond pending appeal in the following grounds:
11. That the appellant left four (4) children who were dependent on him; in that he is the only sole breadwinner and his incarceration is a threat to them since he was imprisoned and he is worried about their welfare.
12. That the appellant has been protecting his property which can now be mis-used since he is imprisoned.
13. That the trial court erred in law and facts by shifting the burden of proof to the appellant; in that it is trite law that an accused person should only be convicted on the strength of the prosecution evidence and not on the weakness of his/her defense.
14. That the sentence imposed upon the appellant was harsh and excessive based on the circumstances and contravened the provisions of Article 47 of *the Constitution*.



15. Violation of appellant's rights: In that it was clear that the trial magistrate was in a hurry to proceed persecuting the accused hence violating accused person's constitutional rights as stipulated under Article 50(c) (j) of *the constitution* which gives the accused person the right to a fair trial which includes the right;
  16. To have adequate time and facilities to prepare for defence.
  17. To be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.
5. The appellant filed written submissions on 3/10/2023, the State on 16/10/2023. Thereafter Mr. Mutuku came on record for the appellant and filed supplementary written submissions.
  6. Being a first appeal the appellant is entitled to a full re-examination, and review of the evidence while the court must keep in mind that it never heard or saw the witnesses testify. I am alive to this limitation
  7. The case for the prosecution was presented by 6 witnesses:

PW1 Esther Ndunge Munguti the complainant testified that

I hail from Mubau village Makueni. I am a farmer. I recall on 11/11/2022 I was cultivating my land when I saw accused carrying a stick. We were using ox-plough and it was Kioko Mbinya who was driving the cows. Accused started insulting me calling me cow, anus and she threatened to kill me. She also threatened to beat me. She also called me a witch. I raised alarm (screams) but she told me I would not do anything. My grandson came there and accused went away. Neighbours gathered there. This is the 4<sup>th</sup> time we are appearing. Efforts to reconcile bore no fruits. I came to Makueni Police Station and reported the matter. I did record my statement.

The accused comes . . . and insults me. Accused is in the dock (Accused identified)

Cross examined by the accused she stated that on that day you were passing going to your land. I was cultivating the land and Kioko saw you. There are other people who saw you. You have been influencing the local police to spoil my cases. On re examination she said I was with my daughter and grandson Mbithe, Kioko and Mwikali. When people appeared accused went and locked herself in the house.

PW2 Erastus Kioko testifies I hail from Kwa Kathoka and I do casual work. I recall on 11/11/2022 as PW1 had hired me to plough her land using oxen. At 11.00 am accused appeared there carrying a stick. She declared that she will kill PW1 and she occupied the land there. PW 1 screamed and accused went away when people gathered there. I am a grandson to PW1 i.e. my grandmother and PW1 are sisters. Accused is a daughter-in-law to PW1. I had no grudge against her. Accused is in the dock (accused identified) I did record a statement with the police at Makueni police station. A neighbour called Solomon appeared.

On Cross-Examination by Accused he said You were carrying a stick and you threatened PW 1. Mbithe and Mwikali were present. You were talking to PW 1. You threatened to kill her and live on her land. I didn't photograph you. I was contracted to cultivate the land. It is not true that I have been bribed to testify. I don't know your land.

PW3 Faith Munguti told the court that I reside at Kwa Kathoka where I am a farmer. On 11/11/2022 PW1 (My mother) asked me to go and help her cultivate. Accused appeared there from her home and started insulting PW1 .She was carrying a stick. She called her dog, cow etc. These problems have persisted for long and we decided to report the same with



the police. Accused is my sister in law and has been married and for over 20 years .We have tried to restrain her to no avail. Accused is in the dock(accused identified) on being Cross Examined by accused she said On that day I was helping my mother PW1 cultivate.

PW4 Lorraine M.Munguti told the court I hail from Kathonzweni /Makueni. I am a trader. I recall 11.11.2022 at 11.00 am we were working on the farm with Kioko and my mother we were cultivating .Accused herein who is my sister in law appeared there and started insulting PW1 my mother calling her anus, cow etc. There was no provocation and I don't know why she was threatening her. She has been troublesome.

On Cross-Examination by accused she said You are my sister in law. We have lived for many years. You never talked to me on the material day you entered the land. I do not own livestock. I do livestock trade. This is not a frame up. You insulted PW1 and even threatened to kill PW1. You were carrying a stick at the time. Neighbours appeared there like Solomon Mutua. I don't utilize your land. This I not frame up.

On Re-examination she said I trade in sale of goats. I have not encroached on accused's land.

PW5 Solomon Mutua Mwanza testified I hail from Kathonzweni /Makueni. I am a farmer. I recall on 11.11.2022 as I as on my way land working. I heard my neighbour gate being hit with a stick. I saw accused enter the land. She started insulting PW1 who was working there. She was with PW4 and Kioko. She called anus, cow .Accused even threatened to kill her.I heard PW1 scream and accused told her that nobody would rescue her. I just witnessed. Accused is in the dock(accused identified).She was known to me. Cross examined by accused she said You are wife to my uncle. I saw you enter the land and came out. You were complaining about goats that had entered the land. I heard you say that you could kill PW1 and there was nothing that will happen. You were alone at the time.

This is not a frame up. I didn't want to involve in the altercation I have no grudge against you. On Re Examination by prosecutor he said This is not a frame up.

PW6 NO 708663 CPL Gitonga Anthony Christian told the court I am attached to Makueni police crime section. On 11.11.22 a report of threatening to kill was reported at station. The OCS the matter to me.

I recorded the witness statements. She availed 4 witnesses. I considered that accused is a daughter in law to PW1 . On that day she appeared on the land where PW1 was cultivating the land with Mbithe, Mwikali and Kioko.

Accused did call PW1 vagina, anus and dog and threatened to kill her. I did visit the scene. Accused and PW1 are neighbours. There was a neighbour who witnessed the incident.

On 18/11/2022 I arrested and charged accused with the offence herein. Accused is in the dock. No recovery was made.Cross examined by Accused he said I gathered the information from the statement that I recorded. Solomon is a neighbour in the locality. I didn't deal with the family issues. PW screamed when you insulted her. No videos were taken. You uttered the words threatening to kill. I fund you outside a shop.

8. In her defence the appellant told the court that:

DW1 Catherine Nzilani Mutuku "I hail from Mubau location Kwa Kathoka Makueni.I am a farmer there. I deny any wrong doing. This is a family dispute between myself and sister in law. PW1 is being used to fix me. Solomon Mutua said that he was called by husband who works in the court.



The Investigating Officer acknowledges that we have bad blood with my relatives ( in-laws) I was just safe guarding my interests. The Investigating Officer harassed me at the time of arrest. No exhibit was produced. They were trying to provoke me. Cross Examined by Prosecutor she said I have lived there for 27 years. We have not had serious differences. Everybody has his/her portion of land. We stay in ancestral land. This is a frame up”.

9. After a summary of the evidence the learned trial magistrate rendered himself thus:

“I have carefully considered the charge preferred and evaluated the evidence adduced. The complainant and accused are relatives. The latter is a daughter in law to the former. They live within the same locality they share family land although each of them has their distinct portion. It is conceded by accused that they had differences which goes to confirm what the complainant stated as regards the conduct of accused towards her. It is not in dispute that on the material day accused appeared at the scene where the complainant was cultivating her land. All the prosecution witnesses categorical that accused utter the threatening words while carrying a stick...I observed that if the accused had a beef with her sister in law one wonders why she had to go for the complainant herein. By stating that ADR should have been applied makes me conclude that indeed accused had been creating problems for the complainant. The allegations that accused would go drinking and on returning home hurl insults at the complainant were not challenged and they remain non-contradicted and proven.

In the end, I find and hold that the prosecution have proven this case beyond reasonable doubt. Accused is guilty and is convicted as charged.

10. In mitigation the accused told the court that she was ready to reconcile.

11. The trial court in its discretion – noted that she was a 1<sup>st</sup> offender and sentenced her to 3 years imprisonment.

12. Section 223(1) provides for the offence of threats to kill. It states: -

1. Any person who without lawful excuse utters, or directly or indirectly causes any person to receive, a threat, whether in writing or not, to kill any person is guilty of a felony and is liable to imprisonment for ten years.

Evidently, the offence of threatening to kill is a felony that could send someone to prison for 10 years.

13. In its submissions, the State is of the view that there was evidence of altercation between the appellant and her mother in law while the appellant was armed with a club. That these altercations amounted to threats to kill the mother in law – that the appellant did not deny the same – but explained that there were family disputes.

14. The State conceded that considering the circumstances of the offence – whereby the threats were verbal, not accompanied by real threats of violence, the sentence was harsh, and urge the court to reconsider the sentence.

15. For the appellant, it is submitted that this court be guided by the holding in the Court of Appeal in Dorcas Jemutai Sang –vs- R (2018) e KLR on the duties of a 1<sup>st</sup> appellate court:

“This court has stated before that there is no set formula to which re-evaluation of evidence by the first appellate court should confirm. The extent and manner in which re-evaluation



may be done depends on the circumstances of each case. The court is expected to scrutinize and make an assessment of the evidence, but not necessarily write a judgment similar to that of the trial court.”

16. It is submitted that an evaluation of the evidence will reveal that the conclusion is not sustainable on numerous grounds. First – that the appellant was charged with this offence – that she uttered certain threatening words to the complainant while armed with a club. However, the testimony of the complainant only reveals that the appellant insulted her by calling her cow, anus, witch and the alleged threatening words are not mentioned in the evidence in her chief – she simply states – she threatened to kill me.
17. The issues for determination are whether the charge of threat to kill was established; and whether the sentence was harsh.
18. The definition of threat – Black’s Law Dictionary 10<sup>th</sup> edition at page 1708 defines threat ;  

“ A communicated intent to inflict harm on loss on another ,, a declaration express implied of an intent to inflict loss on pin on another ,, ” ....”

At page 1002 ‘kill’ is defined as “to end life; to cause physical death
19. Put together it means that the appellant was charged for having communicated to the complainant the intent to end her life.
20. The prosecution was required to establish the communication and its intent.
21. The particulars of the charge are that the appellant uttered certain specific words to the complainant and that it is these words that formed the threat. The words were that “ngakuaa na uyuvetanga vaa” . The charge sheet states that the meaning of the words in English is that “I will kill you and live here forever”.
22. The first thing I noted is that the particulars did not state the language that these words were uttered, and who actually supplied the meaning or translation of the words. It is from the record that it becomes clear that that the parties speak the Kikamba language. This is a moment for disclosure that this court understands this language. The word Ngakuua: means I will kill you (in the future). Uyu vetanga vaa: means remove this one (person?) from here: I have not found any term that says Ngatua vaa tene na tene that means or could mean I will live here forever.
23. In her testimony the complainant did not mention these words to the court and what they meant or how they formed the threat. She did not speak to the alleged words, and hence a specific ingredient of the offence was not established by the complainant.
24. PW2 says“,,, accused appeared carrying a stick declared that she will kill PW1 and she occupied the land there”. This witness speaks to a declaration to kill not that the appellant uttered specific words to communicate a threat to end the life of the complainant. The witness does not state that she witnessed a situation that was life threatening for the complainant. He heard a declaration. He adds the aspect of land to the story – saying that the appellant’s threat to kill the complainant was related to land, an aspect that was not in the complainant’s testimony.
25. Pw3’s testimony is that the appellant “appeared from her home and began to insult the complainant ... she was carrying a stick ... she called her dog, cow etc ... the problems have persisted for long .. we decided to report ...” This witness is a daughter to complainant. She never heard any threats to the mother’s life. It goes without saying that she would have very keen to catch such a threat and deal with



- it. However, she speaks to “problems” between her mother and the appellant that have “persisted for long”. And in her own words these problems are insults from the appellant to the mother. There is no evidence from her that the appellant came anywhere near the complainant/waved the stick or tried to hit the complainant or even went near the complainant.
26. PW4 Lorraine M. Munguti another daughter of the complainant – heard insults which she was able to name – she says on oath – “accused who is my sister in law appeared there and started insulting PW1 my mother, calling her anus, cow. . . there was no provocation. . . I don’t know why she was threatening her. she has been troublesome . . .” on cross examination she says:-
- “You insulted ... and even threatened to kill PW1 ... you were carrying a stick”.
27. In her evidence in chief and cross examination – she brings in the issue of threats to kill however it is noted that she does not speak to the actual words uttered in the alleged threat, or how the threat was expressed. She adds the stick to the story in cross examination and the question must be asked as to whether she was present or was just told what had happened. It is noteworthy that she states that the appellant has been a troublesome sister in law. She mentioned a neighbour one Solomon Mutua to have appeared at the scene when this was going on.
28. Solomon Mutua testified as PW5 – he told the court that the appellant’s husband is his uncle. He testifies that he heard his neighbor’s gate (his grandmother’s gate) being hit with a stick. Then he saw appellant enter the land insulting the complainant calling her cow, anus. He says “accused even threatened to kill her”. He said he heard PW1 scream – and accused tell her that nobody would rescue her. In cross examination he states that the appellant was complaining about goats that had entered her land. The 1<sup>st</sup> thing there he hears is a gate being hit with a stick – then insults – he can specify the insults – but does not state what was said in the alleged threat to kill. He acknowledges that there was a problem that some goats had entered appellant’s land and she was complaining about them.
29. PW6 No. 708663CPL Gitonga Anthony as the investigating officer recorded witness statements. He testified that the appellant is daughter in law of the complainant and that the appellant called complainant names- vagina, anus, dog – he testified that she threatened to kill complainant. He visited the scene – he established that there was a neighbour who witnessed the incident – he did not recover anything. He did not specify the alleged threatening words, begging the question where did he get the words that are stated in the charge sheet?
30. In her defence the appellant told the court that they had were problems with her sister in law – and this case was being used to fix her – yet whatever problem they have would be fixed through ADR. She stated that her husband who works in court is the one who called PW5; that the investigating officer acknowledged that there were family problems.
31. It is noted that PW1 was with PW2, a grandson, PW3 and Pw4 her daughters in the shamba. She testified that she screamed and neighbors came – despite the testimony that neighbors resounded to the threats and came to the scene forcing the appellant to go into hiding no neighbour was called to testify. This left the matter within the family.
32. In arriving at my determination I find illumination in the persuasive determination in *Martin Nganga Kamanu –vs- Republic* [2019] e KLR the High Court held that an altercation cannot constitute a threat to kill. The court stated, in the assessment of this court, this conversation does not amount to someone threatening to kill another. PW2 testified that the appellant followed her to her nearby garden where she was watering her plants. The altercation continued resulting in the appellant pouring water on her. Is this an action of a person who wanted to kill” this court has its doubts. The appellant’s conduct on the material day is completely at variance with the charge that was laid against him. The



prosecution failed to establish to the required standard of proof that indeed the appellant uttered any words showing his intention to kill the complainant”.

33. There appears to have been an altercation among the complainant her daughters and the accused person, an exchange of insults which could have been triggered by the goats that entered the appellant’s shamba. In deed the learned trial court observed that there was beef between the appellant and her sister in law.
34. Counsel for the appellant pointed out that that in the judgment the learned trial court stated that there were allegations that the appellant would go on drinking sprees and come to insult the complainant. The court went on to state that these allegations were not challenged by the appellant. Counsel submitted that none of the witnesses ever stated this in evidence. No witness testified that the appellant would go on drinking sprees and come home to insult the complainant and counsel for the appellant wondered where this had come from. I have read through the record and did not find such testimony from any of the witnesses. However, even if that had been the case that would not have been proof that the appellant had threatened to kill the complainant. It would have been something akin to being drunk and disorderly.
35. With respect to sentence – from the record this was a family related matter. A pre-sentence report would have revealed the underlying issues and would have assisted the court arrive at a sentence that would have addressed those while dealing with any criminality on the part of the appellant. In matters such as this - this in particular where family members are pitted against one or one another, we are obligated as the justice system not to aggravate the matters – but to not only punish but also restore relations as envisaged by Article 159(2) (c) of *the Constitution* - requires of us to encourage AJS mechanisms even through sentencing. Indeed, that is the import of the Judiciary’s blue print, STAJ, which in a way breaks down our mandate to transform society through access to justice.
36. I did ask for a social inquiry report from Probation and After Care Services. This case appears to have been the smoke that revealed the fire beneath. The report reveals a family in spiral mode towards destruction. The family of the appellant’s husband consider her as troublesome and would want her out of the home. The children are have been caught in the cross hairs. They have suffered neglect since these problems began and one of them is traumatized into alcohol abuse.
37. The report indicates that the appellant’s husband who is said to be a Judicial Officer, the complainant who is his mother, do not wish to enter into any reconciliation/ restorative discussions. It is an exercise of their right and cannot be compelled to do so.
38. What needs to be clear is that if indeed the issue is to remove the appellant from her matrimonial home there are separate processes for dealing with matrimonial disputes, and it can never be through the criminal justice system. That would amount to an abuse of the justice system and ought not to be allowed.
39. Ultimately – I have considered the evidence and submissions. Clearly the prosecution witnesses did not testify to the alleged threatening words which were the communication to the complainant of the intent to end her life.
40. The fact that they were not – can only mean they were not uttered – and if they were – no proof that they were.
41. I find that the appeal is merited
42. The appeal is allowed.
43. The conviction is quashed.



44. The sentence of three years imprisonment is set aside.

45. The appellant is to be set at liberty forthwith unless otherwise legally held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT ON 26/4/2024**

**SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA**

**THE JUDICIARY OF KENYA.**

**MAKUENI HIGH COURT**

**HIGH COURT DIV**

**DATE: 2024-05-02 20:56:05**

